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Mohamad Hafizi bin Zainal Abidin v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05(M)-353–09 OF 2020
HANIPAH FARIKULLAH, LEE HENG CHEONG AND CHE MOHD RUZIMA JJCA
23 JUNE 2022

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged under under ss 39B(1)(a) and 12(2) of Dangerous Drugs Act 1952 ('DDA') — Appellant convicted and sentenced to death penalty for first charge and three years' imprisonment and five strokes of rotan for second charge D *— Whether the bag said to contain drugs was not a seized item from appellant — Whether there was break in chain of evidence — Whether the learned High Court judge erred in law and in fact when failed to state whether possession and trafficking were direct or through presumptions under ss 37(d) and 37(da) of DDA*

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On 12 September 2017 at about 6pm, SP2 together with SP3 and sergeant Rozi were on the way from Bakri Police College to the Selangor Police Contingent Headquarters, in a Proton Preve motor vehicle which was driven by SP2, when they were knocked from the back by a Wira Aeroback motor F vehicle driven by the appellant. SP2 and SP3 stopped their vehicle and ordered the appellant to step out from his vehicle. SP3 saw that the appellant was in a seemingly unstable condition. They then asked the appellant for his identity card and driving licence but the appellant could not produce both. SP3 saw there was a black-red bag that slung across the appellant's chest. SP3 then G examined the bag containing clothes and found one orange plastic bag which contained plastic packages and tin foil which contained suspected dangerous drugs. SP3 then seized the items and brought the appellant to the traffic section of Ibu Pejabat Daerah Muar. SP3 then issued a search list form for the seized items. The seized items were then handed over to the investigating officer H ('SP6'). The seized items were sent to the Department of Chemistry Malaysia, Malacca Branch for analysis. The analysis was conducted by the chemist ('SP5') who confirmed that the seized items contained heroin and dangerous drugs to wit, monoacethylmorphines weighing 17.8g and methamphetamine weighing 8.06g. The appellant was charged under ss 39B(1)(a) and 12(2) of the I Dangerous Drugs Act 1952 ('the DDA'). The learned High Court judge ('HCJ') convicted and sentenced the appellant to death penalty for the first charge and three years' imprisonment and five strokes of rotan for the second charge. The appellant appealed against the conviction and sentence imposed in respect of the first charge.

Held, allowing the appeal: A

(1) The appellant's contention that SP6 confirmed that the 'Yamaha' bag was not ever confiscated from the appellant was misleading and wrong. SP6 never agreed that the 'Yamaha' bag was never seized from the appellant. SP6 only agreed that based on the search list form, the 'Yamaha' bag was B never seized. The contradiction between the testimonies of SP2 and SP3 only related to where the 'Yamaha' bag was confiscated and not whether the 'Yamaha' bag existed or not, even though the 'Yamaha' bag was not recorded in the search list form. Even though the 'Yamaha' bag was not stated in the search list form, the absence of stating the seizure of the C 'Yamaha' bag was sufficiently explained by SP3 and SP6, that the seizure of the 'Yamaha' bag was mentioned in the police report and in the handover form of the case exhibits and that there had been no break in the chain of evidence relating to the existence of the 'Yamaha' bag which was said to contain the dangerous drugs. The learned judge did not err in D law and in fact in finding that the 'Yamaha' bag, containing the drugs was an item seized from the appellant (see paras 14–18).

(2) The prosecution had adduced credible evidence to show that there was no gap in the chain of evidence in the handling of the case exhibits from E the very beginning when they were seized by SP3 and then handed over to SP6 until they handed over to SP5 for analysis. SP3's testimony on the seizure of the case exhibits was supported by the search list form, the police report as well as the handover form of the case exhibits. Thus, there were no merits in the contention of the appellant that there was a break F in the chain of evidence when SP6 failed to explain where the exhibits were kept after he received them from the chemist department until they were registered with the store keeper (see paras 20–21 & 23).

(3) The finding by the learned HCJ that, at the end of the prosecution's case G the appellant was in direct possession of the drugs and trafficking of the same based on the presumption under ss 37(d) and 37(da) of the DDA, was an afterthought. There was no mention at all about her finding whether the appellant was in direct possession of the drugs and trafficking of the same or based on the presumptions under ss 37(d) and H 37(da) of the DDA. The omission or failure of the learned HCJ in making a finding of which presumption was she relying on, ie, did she rely on presumed possession or actual possession or did she rely on actual trafficking or presumed trafficking, had an impact on the burden placed on the defence. Such failure of the part of the learned HCJ was fatal. In I the light of the omission or failure of the learned HCJ amounted to a misdirection by way of non-direction on the part of the learned HCJ (see paras 27–28 & 30).

[Bahasa Malaysia summary

Pada 12 September 2017 kira-kira jam 6:00 petang, SP2 bersama SP3 dan sarjan Rozi dalam perjalanan dari Maktab Polis Bakri menuju ke Ibu Pejabat Polis Kontinjen Selangor, menaiki kenderaan bermotor Proton Preve yang dipandu SP2, apabila mereka dilanggar dari arah belakang oleh sebuah kenderaan bermotor Wira Aeroback yang dipandu oleh perayu. SP2 dan SP3 memberhentikan kenderaan mereka dan mengarahkan perayu keluar dari kenderaannya. SP3 melihat perayu berada dalam keadaan tidak stabil. Mereka kemudian meminta perayu untuk memberikan kad pengenalan dan lesen memandu tetapi perayu tidak dapat mengemukakan kedua-duanya. SP3 melihat ada beg berwarna hitam-merah yang disangkut di dada perayu. SP3 kemudian memeriksa beg berisi pakaian dan menemui satu beg plastik berwarna jingga yang mengandungi bungkusan plastik dan kerajang timah yang disyaki mengandungi dadah berbahaya. SP3 kemudiannya merampas barang tersebut dan membawa perayu ke Bahagian Trafik, Ibu Pejabat Daerah Muar. SP3 kemudian mengeluarkan borang senarai geledah bagi barangan yang dirampas. Barangan yang dirampas kemudiannya diserahkan kepada pegawai penyiasat ('SP6'). Barangan rampasan dihantar ke Jabatan Kimia Malaysia Cawangan Melaka untuk dianalisis. Analisis dijalankan oleh ahli kimia ('SP5') yang mengesahkan barang rampasan itu mengandungi heroin dan dadah berbahaya iaitu monoacethylmorphines seberat 17.8g dan methamphetamine seberat 8.06g. Perayu didakwa di bawah ss 39B(1)(a) dan 12(2) Akta Dadah Berbahaya 1952 ('ADB'). Hakim Mahkamah Tinggi yang bijaksana ('HMT') mensabitkan dan menjatuhkan hukuman mati kepada perayu bagi pertuduhan pertama dan penjara tiga tahun serta lima sebatan rotan bagi pertuduhan kedua. Perayu merayu terhadap sabitan dan hukuman yang dikenakan berhubung pertuduhan pertama.

Diputuskan, membenarkan rayuan:

(1) Hujahan perayu bahawa SP6 mengesahkan bahawa beg 'Yamaha' tidak pernah dirampas daripada perayu adalah mengelirukan dan salah. SP6 tidak pernah bersetuju bahawa beg 'Yamaha' tidak pernah dirampas daripada perayu. SP6 hanya bersetuju berdasarkan borang senarai geledah, beg 'Yamaha' itu tidak pernah dirampas. Percanggahan antara keterangan SP2 dan SP3 hanya berkaitan di mana beg 'Yamaha' dirampas dan bukannya sama ada beg 'Yamaha' itu wujud atau tidak, walaupun beg 'Yamaha' itu tidak direkodkan dalam borang senarai geledah. Walaupun beg 'Yamaha' tidak dinyatakan dalam borang senarai geledah, ketiadaan menyatakan rampasan beg 'Yamaha' cukup dijelaskan oleh SP3 dan SP6, bahawa rampasan beg 'Yamaha' telah disebut dalam laporan polis dan dalam bentuk penyerahan ekshibit kes dan tiada putusnya rantaian bukti berkaitan kewujudan beg 'Yamaha' yang dikatakan mengandungi dadah berbahaya itu. Hakim yang bijaksana tidak tersilap di sisi undang-undang dan fakta dalam mendapati beg

'Yamaha' yang mengandungi dadah itu adalah barang yang dirampas daripada perayu (lihat perenggan 14–18).

(2) Pihak pendakwaan telah mengemukakan keterangan yang boleh dipercayai untuk menunjukkan bahawa tiada jurang dalam rantaian keterangan dalam pengendalian ekshibit kes sejak awal lagi apabila dirampas oleh SP3 dan kemudian diserahkan kepada SP6 sehingga diserahkan kepada SP5 untuk analisis. Keterangan SP3 mengenai rampasan ekshibit kes itu disokong oleh borang senarai geledah, laporan polis serta borang serah terima barang kes. Oleh itu, tiada merit dalam hujahan perayu bahawa terdapat putusnya rantaian keterangan apabila SP6 gagal menjelaskan di mana ekshibit itu disimpan selepas dia menerimanya daripada jabatan kimia sehingga ia didaftarkan dengan penjaga stor (lihat perenggan 20–21 & 23).

(3) Dapatan oleh HMT yang bijaksana bahawa, pada akhir kes pendakwaan perayu mempunyai pemilikan langsung dadah dan mengedar dadah itu berdasarkan anggapan di bawah ss 37(d) dan 37(da) ADB, adalah satu pemikiran kemudian. Tidak disebutkan sama sekali mengenai dapatannya sama ada perayu mempunyai pemilikan langsung dan mengedar dadah atau berdasarkan anggapan di bawah ss 37(d) dan 37(da) ADB. Peninggalan atau kegagalan HMT yang bijaksana dalam membuat dapatan tentang anggapan mana beliau bergantung, iaitu, sama ada beliau bergantung pada anggapan pemilikan atau pemilikan sebenar atau sama ada beliau bergantung pada pengedaran sebenar atau anggapan pengedaran, mempunyai kesan ke atas beban yang diletakkan kepada pembelaan. Kegagalan oleh HMT yang bijaksana itu adalah memudaratkan. Memandangkan peninggalan atau kegagalan HMT yang bijaksana adalah merupakan salah arah dengan cara ketidakpatuhan di pihak HMT yang bijaksana (lihat perenggan 27–28 & 30).]

Cases referred to

Jorge Crespo Gomez v Public Prosecutor [2020] 5 MLJ 250; [2020] 8 CLJ 292, FC (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 37(d), 37(da), 37(da)(iiia), 39A(1), 39B(1)(a), 39B(2), First Schedule

Appeal from: Criminal Trial No JB-45A-07–04 of 2018 (High Court, Muar)

Zamri bin Ibrahim (Zamri Ibrahim & Co) for the appellant.
Mohd Zain bin Ibrahim (Public Prosecutor, Attorney General's Chambers) for the respondent.

Lee Heng Cheong JCA:

INTRODUCTION

[1] The appellant (accused) was charged under ss 39B(1)(a) and 12(2) of the Dangerous Drugs Act 1952 ('the DDA') as follows:

(a) first charge:

> Bahawa kamu pada tarikh 12 September 2017, jam lebih kurang 6:00 petang bertempat di Lebuhraya AMJ Kesang, di dalam daerah Tangkak dalam negeri Johor, telah mengedar dadah berbahaya iaitu 17.8 gram heroin dan monoacetylmorphines, dengan itu kamu telah melakukan kesalahan di bawah *s 39B(1)(a) Akta Dadah Berbahaya 1952* dan boleh dihukum di bawah *s 39B(2) akta* yang sama ('the first charge'); and

(b) second charge:

> Bahawa kamu pada tarikh 12 September 2017, jam lebih kurang 6:00 petang bertempat di Lebuhraya AMJ Kesang, di dalam daerah Tangkak dalam negeri Johor, telah mengedar dadah berbahaya iaitu 8.09 gram Methamphetamine, dengan itu kamu telah melakukan kesalahan di bawah *s 12(2) Akta Dadah Berbahaya 1952* dan boleh dihukum di bawah *s 39A(1) akta* yang sama ('the second charge').

[2] The trial proceeded before the learned High Court judge ('the learned HCJ') who convicted and sentenced the appellant to the death penalty under s 39B(2) of the DDA for the first charge and for the second charge, the appellant was sentenced to three years' imprisonment from 3 September 2020 and five strokes of the rotan.

[3] The appellant appealed to the Court of Appeal against the conviction and sentence imposed in respect of the first charge and the appeal came before us. After perusing through the appeal records and hearing submissions from both parties, we find that there are appealable errors in the decision of the learned HCJ and that the conviction was unsafe. Hence, we unanimously allowed the appeal. We set aside the convictions and sentences imposed by the learned HCJ.

[4] Herein below are our grounds for allowing the appeal.

THE PROSECUTION'S CASE

[5] The salient facts as found by the learned HCJ are as follows:

(a) on 12 September 2017, at about 6pm, when corporal Mohd Adzli bin Mohd Tahar (SP2) together with sub-inspector Mohd Rais bin Sabar

(SP3) and sergeant Rozi were on the way from Bakri Police College to the Selangor Police Contingent Headquarters, in a motor vehicle to wit, a Proton Preve bearing the registration number, WYL7794, which was driven by SP2, when they were knocked from the back by another motor vehicle driven by the appellant who was driving a Wira Aeroback motor vehicle with a registration number, WGP6525. This accident occurred at KM8, Highway AMJ Kesang, District of Tangkak, Johor;

(b) after the accident, SP2 and SP3 stopped their vehicle and they ordered the appellant, to step out from his vehicle, SP3 saw that the appellant was in a seemingly unstable condition. They then asked the appellant for his identity card and driving licence but the appellant could not produce both. SP3 saw there was a black-red bag that slung across the appellant's chest;

(c) SP3 then examined the bag containing clothes and found one orange plastic bag which contained plastic packages and tin foil which contained suspected dangerous drugs. SP3 opened the bag in front of the appellant;

(d) SP3 then seized the items and brought the appellant to the traffic section of Ibu Pejabat Daerah Muar. SP3 then issued a search list form for the seized items. The seized items were then handed over to SP6, the investigating officer;

(e) the seized items were sent to the Department of Chemistry Malaysia, Malacca Branch for analysis. The analysis was conducted by the chemist (SP5) who confirmed that the seized items contained heroin and dangerous drugs to wit, monoacethylmorphines weighing 17.8g and methamphetamine weighing 8.06g. These drugs were confirmed by SP5, to be dangerous drugs as listed in the First Schedule of the DDA; and

(f) investigation into the motor vehicle to wit, the Wira Aeroback bearing the registration number WGP6525 showed that it was owned by Ahmad bin Hj Samin who had passed away. The appellant said that he bought said the motor vehicle, three months before the accident.

THE FINDINGS OF THE TRIAL JUDGE AT THE CLOSE OF THE PROSECUTION'S CASE

[6] At the close of the prosecution's case, the learned HCJ in his ground of judgment found inter alia as follows:

(a) that the prosecution has succeeded in proving that there is no break in the chain of evidence from the time, the exhibits were confiscated by SP3 until the time they were handed over to SP6, the investigating officer, then to SP5, the chemist, for analysis. All the case exhibits have been

properly marked by SP3 and SP6, by putting their signatures and dates on them. Both witnesses identified all the markings made by them in open court during trial;

(b) his motor car with a black-red bag slung across his chest;

(c) that there is no doubt about the identity of the drugs even though the defence contended that there is a difference in the markings made by SP6 ie the investigating officer, inspector Shashitharan Nair a/l Govindan, with by the markings made by SP3, the complainant;

(d) that even though the black-red 'Yamaha' bag ('Yamaha' bag') has not been listed in the search list form (exhs P11A and P11B), the orange plastic bag (exh P7(c)) which contained the drugs was recorded as a case item in *borang serah terima barang kes* (exh P12). In the police report (exh P13) made by SP3 and in the *borang serah terima barang kes* (exh P12), it was recorded that there was a black-red 'Yamaha' bag. Thus, the learned HCJ found that the non-listing of the black-red bag in the search list form is not a fatal one and that the appellant cannot deny possession of the drugs. The testimonies of SP2 and SP3 are clear in that the drugs were found in orange plastic bag which was found in the black-red 'Yamaha' bag carried by the accused in front of his chest at the material time. Hence the prosecution had already proven that the appellant has possession and knowledge of drugs found in an orange plastic bag (exh P7(c)) which was removed from the black-red 'Yamaha' bag (exh P7(b)) during the arrest of the appellant;

(e) that he agreed with the prosecution's invocation and reliance of the presumption of trafficking under s 37(da)(iiia) of the DDA as SP5, the chemist, testified that the net weight of the drugs is 17.8g that is a mixture between 7.31g of heroin and 10.49g of monoacetylmorphines. The appellant was in possession of the drugs found in exhs P7(c) and P7(b) which was worn by the appellant, at the front of his chest for the purpose of trafficking in drugs; and

(f) based on the above reasons, the learned HCJ found that the prosecution had proven a prima facie case against the appellant and ordered the appellant to enter his defence.

THE FINDING OF THE LEARNED HCJ AT THE END OF THE TRIAL

[7] At the end of the trial, the learned HCJ found inter alia as follows:

(a) in para [26] of his grounds of judgment, the learned HCJ held that at the end of the prosecution's case, he found that the appellant was in direct possession of the drugs and trafficking of the same based on the presumption under s 37(da) of the DDA;

(b) that the appellant merely denied the prosecution's case and brought up issues which were never raised during the prosecution's case;

(c) that it was never suggested by the defence about the existence of the black-orange bag with the brand 'AStar'. The defence was only disputing the existence of the 'Yamaha' bag, not being stated in the search list form (exhs P11A and P11B), instead of suggesting that on that date, the appellant brought the black-orange 'AStar' bag;

(d) that there was a failure on the part of the appellant to produce his admission card to show that he received the medicine from the hospital;

(e) that there is no black-orange bag with the brand 'AStar' produced in court in support of his evidence;

(f) that the appellant failed to rebut the prosecution's case and presumption under s 37(da)(iiia) of the DDA in respect of the possession and trafficking on the balance of probabilities; and

(g) he accordingly convicted the appellant on the first charge and sentenced the appellant to death by hanging.

THE DEFENCE'S CONTENTIONS BEFORE US/COURT OF APPEAL

[8] Before this court, the appellant contended as follows:

(a) That the learned HCJ erred in law and in facts in failing to consider that the 'Yamaha' bag (exh P7(b)) said to contain the drugs, was not an item which was seized from the appellant;

(b) That the learned HCJ erred in law and in fact in failing to consider that there was break in the chain of evidence when SP6 failed to explain where the exhibits were kept after he received them from the chemist department on 14 December 2017 until they were registered with SP1, the store keeper on 17 December 2017; and

(c) The learned HCJ erred in law and in fact where in the notes of proceedings, he failed to state whether possession and trafficking were direct or through presumptions under ss 37(d) and 37(da) of the DDA in her decision to order the appellant to enter his defence.

CONSIDERATION OF THE ISSUES RAISED BY THE APPELLANT

Issue (a): Whether the learned HCJ erred in law and in facts in failing to consider that the bag (exh P7(b)) said to contain the drugs, was not a seized item from the appellant

[9] The appellant contended that in SP2's testimony, he gave a description of the 'Yamaha' bag (exh P7(b)) which is said to contain packages of the

dangerous drugs which were confiscated by SP3 at Ibu Pejabat Daerah Polis Muar (see his testimony in notes of proceedings at pp 45–46 RR, Vol 2).

[10] However, SP3 confirmed and testified that the 'Yamaha' bag was confiscated at the scene of the accident (see SP3's testimony at notes of proceedings at pp 60–63 RR, Vol 2).

[11] It is pertinent to note that the appellant's version of events which was only brought up when he testified in his defence, is that at the material time, he was not carrying the 'Yamaha' bag but another bag with the 'AStar' brand which contained his handphone, wallet and medicine. Further, the appellant also stated that his bag was confiscated by SP3 after the accident at the scene of the accident.

[12] Having perused the relevant portions of the notes of proceedings, we are in agreement with the learned HCJ's finding that it was never suggested or put by the defence during the prosecution's case about the existence of the black-orange bag with the brand 'AStar'. The defence was only disputing the existence of the 'Yamaha' bag and that it was not being recorded in the search list form (exhs P11A and P11B), instead of suggesting that on that date, the appellant was carrying the black-orange 'AStar' bag instead of the 'Yamaha' bag.

[13] It is noted that the appellant's case at the stage of the prosecution's case was a mere denial of the prosecution's case and the issue of the existence of the 'AStar' bag was never brought up during the prosecution's case. This important issue of the 'AStar' bag was also never put to any of the witnesses of the prosecution in particular SP2, SP3 and SP6. It was only brought up in the defence's case when the appellant was examined by his counsel.

[14] We are of the considered opinion that the appellant's contention that SP6, who is the investigating officer confirmed that the 'Yamaha' bag was not ever confiscated from the appellant (notes of proceedings at p 120 RR, Vol 2) is misleading and wrong. This is what SP6 testified in cross-examination:

> *Q: Saya rujuk kepada P11(a) dan (b) dan P12, borang serah terima. Jika kita lihat P11(a) dan (b) tiada disebutkan jenama beg Yamaha, setuju dengan saya?*
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> A: Setuju
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> Q: Dan di P12 ada disebut beg jenama Yamaha?
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> A: Setuju
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> Q: P11(a) dan (b) adalah borang rasmi senarai geledah dan tiada disebutkan tentang beg Yamaha?
>
> A: Setuju

Q: Oleh itu saya cadangankan menurut P11(a) and (b) beg Yamaha itu tidak pernah wujud?

A: Tidak setuju

Q: Mungkin ini soalan ulangan. Daripada P11(a) dan (b) beg jenama Yamaha ini tidak pernah dirampas daripada YDS menurut dokumen ini?

A: Mengikut dokumen geledah ini memang tiada.

[15] From our perusal of SP6's above testimony in cross-examination, it is clear that SP6 never agreed that the 'Yamaha' bag was never seized from the appellant. SP6 only agreed that based on the search list form (exhs P11(a) and (b)), the 'Yamaha' bag was never seized.

[16] We find that the contradiction between the testimonies of SP2 and SP3 only related to where the 'Yamaha' bag was confiscated and not whether the 'Yamaha' bag existed or not, even though the 'Yamaha' bag was not recorded in the search list form.

[17] In our considered opinion, even though the 'Yamaha' bag was not stated in the search list form (exhs P11(a) and (b)), we find that the absence of stating the seizure of the 'Yamaha' bag was sufficiently explained by SP3 and SP6, that the seizure of the 'Yamaha' bag was mentioned in the police report (exh 13) and in the handover form of the case exhibits (exh P12) and that there has been no break in the chain of evidence relating to the existence of the 'Yamaha' bag which is said to contain the dangerous drugs.

[18] In the light of our above findings, we are of the considered view that the learned judge did not err in law and in fact in finding that the 'Yamaha' bag (exh P7(b)), containing the drugs was an item seized from the appellant.

Issue (b): Whether the learned HCJ erred in law and in fact in failing to consider that there was break in the chain of evidence when SP6 failed to explain where the exhibits were kept after he received them from the chemist department on 14 December 2017 until they were registered with SP1 on 17 December 2017

[19] In respect of the contention of the appellant, that there was a break in the chain of evidence when SP6 failed to explain where the exhibits were kept after he received them from the chemist department on 14 December 2017 until they were registered with SP1 on 17 December 2017, we find that there are no merits in this contention.

[20] From our perusal of the notes of proceedings, we are of the considered view that the prosecution has adduced credible evidence to show that there was no gap in the chain of evidence in the handling of the case exhibits from the

very beginning when they were seized by SP3 and then handed over to SP6, the investigating officer, until they handed over to SP5, the chemist for analysis. Further, all case exhibits were properly marked by SP3 and SP6, by affixing their signatures and dates. Both the witnesses have also identified all the markings made by them in the open court during the trial. SP3 had also identified the case exhibits based on photographs of the case exhibits taken after the arrest of the appellant.

[21] We find that SP3's testimony on the seizure of the case exhibits was supported by the search list form, the police report as well as the handover form of the case exhibits (exh P12). SP5 also identified case exhibits through the markings that she made, by pasting a laboratory number sticker on each of the cases exhibits received and analysed by SP5.

[22] SP6 testified that he received the case exhibits from the department of chemistry on 14 December 2017, he kept them in the steel cupboard in his office and then passed all the case exhibits including the 'Yamaha' bag and the dangerous drugs to SP1, the store keeper who recorded them in the store inventory book on 17 December 2017 and kept them in the store, for safekeeping and then brought the case exhibits to the court during the trial of this case.

[23] In the light of the above, we thus find that there are no merits in this contention of the appellant.

Issue (c): Whether the learned HCJ erred in law and in fact where in the notes of evidence, he failed to state whether possession and trafficking were direct or through presumptions under ss 37(d) and 37(da) of the Dangerous Drugs Act 1952 in her decision to order the appellant to enter defence

[24] The appellant contended that the learned HCJ in the notes of proceedings, held at the end of prosecution's case (p 5 RRT, encl 25) as follows:

> *Mahkamah: Setelah mendengar keterangan semua saksi dan setelah meneliti kesemua eksibit dan setelah mendengar hujahan lisan dan meneliti hujahan bertulis dari kedua-dua pihak, berdasarkan penilaian maksimum saya berpuas hati dan berpendapat pihak pendakwaan telah dapat membuktikan satu kes prima facie seperti pertuduhan terhadap tertuduh dan dengan itu tertuduh dipanggil untuk membela diri* ('ruling at the end of the prosecution's case')

[25] In the light of the learned HCJ's above ruling, the appellant thus contended that he was not informed at the end of the prosecution's case when he was ordered to enter his defence by the learned HCJ as to whether the learned HCJ found that there was direct evidence of possession and trafficking or by way of presumptions under ss 37(d) and 37(da) of the DDA. Thus, the

appellant contended that he was prejudiced in his defence and such omission or failure on the part of the learned HCJ is fatal. A

[26] In support of his contention, the appellant relied on the Federal Court case of *Jorge Crespo Gomez v Public Prosecutor* [2020] 5 MLJ 250; [2020] 8 CLJ 292. B

[27] Although in paragraph [26] of his grounds of judgment, the learned HCJ held that at the end of the prosecution's case, he ruled the appellant was in direct possession of the drugs and trafficking of the same based on the presumption under ss 37(d) and 37(da) of the DDA. We however find that such a finding in her grounds of judgment is an afterthought as our perusal of the relevant pages of the notes of proceedings showed that other than the above 'ruling at the end of the prosecution's case', there was no mention at all about her finding whether the appellant was in direct possession of the drugs and trafficking of the same or based on the presumptions under ss 37(d) and 37(da) of the DDA. C D

[28] We are of the considered opinion that the omission or failure of the learned HCJ in making a finding of which presumption was he relying on, ie, did he rely on presumed possession or actual possession or did he rely on actual trafficking or presumed trafficking, had an impact on the burden placed on the defence. Such failure of the part of the learned HCJ is fatal. E

[29] We are guided by the Federal Court case of *Jorge Crespo Gomez v Public Prosecutor* [2020] 5 MLJ 250; [2020] 8 CLJ 292 which set aside a conviction under s 39B(1)(a) of the DDA and substituted it with a conviction under s 12(2) of the DDA and sentence of ten years imprisonment when the learned judicial commissioner failed to make findings at the end of the prosecution's case on whether the possession/ownership and trafficking/distribution is directly or through the presumptions under ss 37(d) and 37(da) of the DDA. This is what Zabariah Mohd Yusof FCJ delivering the judgment of the court, inter alia held: F G

> [23] ... The concern here is the *failure of the learned JC in making a finding of which presumption* was he relying on, ie, did he rely on presumed possession or actual possession or did he relying on actual trafficking or presumed trafficking ... . H
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> [24] The aforesaid disclosed that His Lordship *did not make an election* as to which presumption he had relied on. He had adverted to both presumptions under ss 37(d) and 37(da) of the DDA and also s 2 without making a finding as to *whether the appellant was found to be in current possession or was presumed to be trafficking under s 37(da) of the DDA or whether the appellant was presumed to be in possession of the drugs under s 37(d) of the DDA and was found to be trafficking under s 2 of the DDA*. I
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> ...

A [26] It is *imperative that the learned JC made his election as to which presumption he was relying on*, namely whether it was current possession based on the evidence before him or presumed possession under *s 37(d) of the DDA* and whether it was actual trafficking based on the evidence or presumed trafficking *under s 37(da) of the DDA*, as *such finding had an impact on the burden placed on the defence*.

B [27] Hence, by invoking all the alternative presumptions available, it would have an effect that the appellant would have to grab all the presumptions (alternative ones included) that had been invoked against him. That would be a heavy burden on the appellant as the *standard of proof to rebut a presumption is on a balance of probabilities. If the court had acted on the available evidence in proof of the relevant ingredients* C *without resorting to presumptions there is only an evidential burden on an accused person to raise a reasonable doubt*. All these could have been avoided if only the learned judge made a definite finding on which presumption precisely that the appellant has to grab. In this regard, the view by Augustine Paul J in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649 is relevant:

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> It must first be observed that reliance on the presumption provisions where there is available evidence of the facts presumed will be unfavorable to the accused. This is because where the court relies on a statutory provision relating to presumption of law like the presumption provisions it is bound to take the facts as proved until evidence to the contrary is given, on a balance of probabilities, to E disprove it (see *Public Prosecutor v Yuvaraj* [1989] 2 MLJ 69; *Nagappan a/l Kuppusamy v Public Prosecutor* [1988] 2 MLJ 53). This results in a legal burden being imposed on an accused person though it is not illegal. Failure to discharge the burden, even where a reasonable doubt as to guilt exists, will be followed by conviction (see *State v Mello & Another* [1999] 1 LRC 215). However, *if the court* F *had acted on the available evidence in proof of the relevant ingredients without resorting to presumptions there is only an evidential burden on an accused person to raise a reasonable doubt*. Thus indiscriminate use of presumptions when there is evidence of the facts to be presumed will be unfavorable to the accused as it will place a heavier burden on him which could have been avoided. *Fairness to the* G *accused therefore demands that the presumption provisions are used only when there is no evidence of the facts to be presumed*.

[28] The approach by the learned JC in *not electing or making a finding* as to which presumption he relied on for possession and trafficking but by merely relying on alternatives was most undesirable. *This amounts to a misdirection by way of* H *non-direction on the part of the learned JC.*

[29] The prosecution and the Court of Appeal relied on *Raman Kunjiraman* (above) to state that there is nothing wrong to state the various alternative presumptions that are available. That we agree, however, *there must be specific finding as to which particular presumption the court is invoking to pin on the accused person, as that would* I *have a bearing on the burden that the appellant would have to discharge when adducing his defence*. In *Raman Kunjiraman* there was a definite finding of which presumption was applied by the court, unlike the present case where there was no finding made by the learned JC. (Emphasis added.)

[30] In the light of the omission or failure of the learned HCJ in making a finding of which presumption was he relying on, ie, did he rely on presumed possession or actual possession or did he relying on actual trafficking or presumed trafficking which is imperative as such finding had an impact on the burden placed on the defence, we find that such a failure or omission amounts to a misdirection by way of non-direction on the part of the learned HCJ.

CONCLUSION

[31] Based on the aforesaid reasons, we found merit in the appeal canvassed before us and we unanimously find that the sentence and conviction against the appellant are unsafe and as such, we allowed the appellant's appeal against sentence and conviction. The learned HCJ's decision on the conviction and sentence is set aside. The appellant is released and acquitted from the first charge.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh